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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 27

UNITED STATES OF AMERICA, APPELLANT

v.

CONTAINER CORPORATION OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion, findings of fact and conclusions of law of the district court (App. 483–584) are reported at 273 F. Supp. 18.

JURISDICTION

The judgment of the district court was entered on August 31, 1967 (App. 585–586). Notice of appeal was filed on October 30, 1967. Probable jurisdiction was noted on April 22, 1968 (App. 592). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Sealy, Inc.*, 388 U.S. 350.

QUESTIONS PRESENTED

Since 1955 manufacturers in the paper box industry in the Southeastern United States have, upon request, furnished each other price information from which a manufacturer bidding on a specific order by a particular customer can determine the price his competitor is asking. The questions presented are:

1. Whether the defendants' actions constitute an "agreement" or "combination" to exchange price information, within the meaning of Section 1 of the Sherman Act.

2. Whether such an agreement or combination violates Section 1 because it restrains price competition.

STATUTE INVOLVED

The relevant portion of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT

On October 14, 1963, the United States filed a complaint (App. 4) charging that nineteen[1] manufacturers of corrugated paper containers in the Southeastern United States[2] had, from 1955 to the date of

[1] The case against one of the 19 original defendants was dismissed after that firm went out of business.

[2] The Southeastern United States is defined in the complaint as the States of Virginia, North and South Carolina, Georgia, Florida, Alabama, Tennessee, and Kentucky.

filing, "engaged in a combination and conspiracy * * * [which] has consisted of a continuing agreement, understanding, and concert of action" to exchange information as to the prices each had most recently charged or quoted to specific customers in that area, for the purpose and with the effect of restricting competition among themselves in the sale of corrugated containers. After trial, the district court held that the government had not shown either a combination and conspiracy or a restraint of competition, and dismissed the complaint (App. 585).

1. THE FACTS

A. THE INDUSTRY

Defendants, who account for approximately 90 percent of the shipments of corrugated containers from plants in the Southeastern United States, have had since 1961 aggregate sales there each year of more than $100 million (F. 8).[3]

While most corrugated containers are made to a customer's specifications as to dimensions, weight, color, and so forth (F. 5), they are also a standardized product in that all containers made to particular specifications are substantially identical regardless of who produces them (F. 28). Therefore, the prices purchasers will pay are determined on the basis of available price alternatives (F. 28). The industry

[3] "F." refers to the district court's numbered findings of fact, which are reproduced at pp. 485–563 of the Appendix. "CX" refers to the court's exhibits. "Tr." refers to the transcript of proceedings in the district court, where not reproduced in the Appendix.

practice is to utilize delivered pricing (*e.g.*, F. 22(f); App. 594, 703–704); and to keep business or obtain new customers or additional business from existing customers, suppliers must not exceed a competitor's price (F. 25). Some purchasers do not accept the lowest initial quotation, but allow other manufacturers to meet or beat it (F. 28). The order will then be divided among manufacturers meeting the lowest bid (F. 28). It is the practice in the industry for each purchaser to buy from two or more suppliers concurrently (F. 24).

B. EXCHANGE OF PRICE INFORMATION AMONG DEFENDANTS

When a defendant wished to submit a quotation for a particular order, it would first attempt to ascertain the price alternatives available to the purchaser (App. 565–566 F. 19, 27).[4] This information might be obtained from its own records of prior sales—if it had recently supplied the customer with similar boxes—or from the customer if the latter was willing to furnish it (F. 29). However, since a defendant's own records did not always contain such information, and since on occasion customers refused to furnish it or furnished inaccurate or misleading information (F. 30), there were times when the last price offered a specific customer could be ascertained only by asking a defendant's competitor.

To meet this need, all the defendants had a regular practice of requesting and obtaining from each other

[4] This information was particularly important to a defendant when there had been a general price increase in the industry and it wanted to know whether competitors had increased their price quotations to a particular customer (F. 187, 312).

the most recent price offered a specific customer whenever defendants believed that they needed such information from that source (F. 69, 85, 95, 107, 117, 130, 146, 162, 183, 197, 208, 222, 238, 251, 262, 275, 289). Although it might be supplied in different forms (F. 55),[5] this information would always reveal either the most recent price charged a specific customer in an actual sale or the price most recently quoted (F. 29). Employees of all but two defendants testified either that they gave, on request, their last quotation to a particular customer, whether a sale had been completed or not, or that the information given disclosed "the going price," what a specific customer was "then paying," or what a competitor was "then charging" (App. 622, 633–634, 639, 644–645, 669, 685, 699–700, 712, 718–720, 740, 759, 767–768, 771–772, 785, 788, 801, 842, 855–856, 882).

The court found that each defendant made an independent decision whether to request or furnish price information (F. 35), and that the extent and frequency with which such information was requested or furnished varied from defendant to defendant, from

[5] Defendants used published manuals, containing formulas into which could be put the price being quoted for container board of a specific type ("board level") and for setting up the machinery to make containers of certain specifications (the "set-up charge") in order to derive the actual prices charged ("end prices") on various types of containers included in one order (F. 47, 52, 53). The most recent price offered to a specific customer was usually furnished to competitors in terms of the end price for the manufactured containers if only a few different types were involved in an order, and in terms of board levels if a larger number were involved (F. 55).

plant to plant, and from customer to customer (F. 32). Although there was no express agreement for the exchange of such information (F. 33), each defendant normally furnished it accurately upon request from another defendant (F. 31, 70, 86, 96, 107, 118, 131, 147, 165, 183(b), 198, 209, 223, 239, 252, 263, 276, 290), with the implied understanding that in the future it could similarly obtain like information (App. 565).[6]

C. THE DEFENDANTS' USE OF PRICE INFORMATION

A defendant regularly supplying a customer with corrugated containers would usually quote the same prices on additional orders from that customer as its previous prices, unless there had been a change in production costs, specifications, volume requirement or competitive conditions (F. 23). However, upon obtaining reliable information, from whatever source, as to the price alternatives offered to a buyer by competitors, a defendant would, in the majority of instances, quote substantially the same price as that offered by its competitors (F. 28).[7] Even when a de-

[6] The court specifically found that seven defendants gave price information in the belief or hope that if they did so, they would receive such information when they requested it (F. 151(f), 190, 215, 230, 270, 282, 296), and that when four defendants stopped requesting such information, they also stopped furnishing it (F. 71, 167, 186, 262).

[7] In determining whether to seek a particular order at a particular time and at what price, each defendant considered several factors, including its own manufacturing costs and anticipated profit, the desirability of the business in view of its production situation at that time, its last price to the customer, and the prices offered by competitors (F. 22). Some-

fendant decided to quote a lower price, as it occasionally did (F. 37), knowledge of its competitors' prices enabled it to avoid going as low as it might be willing (F. 139, 151(e); App. 712).

D. THE MARKET

Sales of corrugated containers increased from slightly more than 9 billion square feet in 1955 to almost 16 billion square feet in 1963 (F. 9). Demand for such containers is determined by the volume of sales of disparate products manufactured and sold by 10,000 buyers of such containers (F. 14, 10). At any particular time, demand for containers is based upon current shipping needs of purchasers,[8] and therefore appears to be quite inelastic.

The court found that this industry was highly competetive (F. 16), and that each defendant had price competition in the sale of containers, although not necessarily from all other defendants, at all times, in all areas or for all purchasers (F. 68, 84, 94, 106, 116, 129, 145, 155, 182, 196, 207, 221, 237, 250, 261, 274, 288). The number of defendants actually competing for the business of a particular customer was limited to those with plants located within economic shipping distance (App. 594, 703–704; CX6, p. 458). Purchasers

times a defendant would not want the business at the price offered by its competitors and would therefore quote a higher price (F. 28). In a majority of instances, it would quote the same price as its competitors (F. 28). After receiving price information from a competitor, a defendant would occasionally cut prices (F. 37).

[8] Purchasers do not carry these containers in their inventories or enter into long-term requirements contracts with a supplier (F. 14).

were free to and did shift all or part of their business from one supplier to another (F. 17). Each defendant annually lost a substantial number of customers that it had the year before and gained many it had not had (F. 17). Each defendant also had continuing and substantial losses and gains in its sales to particular customers (F. 17).

During the period covered by the complaint (1955 to 1963), productive capacity in the Southeastern market in each year has exceeded demand for corrugated containers (F. 12), and corrugated container prices have trended down (F. 15). Prices of corrugated board, the basic material used in the manufacture of these containers (F. 6), fluctuated, but were approximately the same at the beginning and the end of the period, while labor rates, machine costs and other production costs increased (F. 15). During this same period, despite this excess capacity and the downward trend of prices, the industry has expanded in the Southeastern United States from 30 manufacturers (9 of whom are defendants) with 49 manufacturing plants, to 51 manufacturers (18 of whom are defendants) with 98 manufacturing plants (F. 9).

An ample supply of raw materials and machinery makes entry into the industry relatively easy. An initial investment of only $50,000 to $75,000 is sufficient for a viable enterprise (F. 11). Unit costs of manufacturing corrugated containers vary from plant to plant and from time to time, depending on the amount and type of other business in the plant (F. 13), and there is no general uniformity of prices among the de-

fendants or among the plants of an individual defendant (F. 21).

E. THE TRADE ASSOCIATION AND MEETINGS OF COMPETITORS

All but three of the defendants belonged to the Fibre Box Association, a nation-wide trade association (F. 61). The association furnished to defendants monthly the overall industry price trends computed from total industry sales, and weekly an analyzed price trend, computed from sales of more standard containers (F. 63). Each association member was also furnished his own individual price trend (F. 63). The association held monthly meetings at which these statistics and those showing raw material production and inventory were discussed, along with current business conditions, including current and expected demand as indicated by incoming orders (F. 64).

During this period, there were various meetings attended by some defendants at which firms announced price increases (F. 302, 305, 312, 313), tried to determine if competitors would similarly increase prices (F. 313, 316, 319, 320), and discussed generally such competitive problems as how price increases were holding or how they could compete with outside manufacturers (F. 303, 306, 312, 321, 323). There were no agreements made at the meetings that all would follow any particular price increase (App. 568).

2. THE DISTRICT COURT'S DECISION

The district court held that the government had not proved either the existence of an agreement among the defendants to exchange information as to the most re-

cent price charged or quoted to specific customers, or that such an agreement would have the purpose and effect of minimizing price competition.[9]

The court concluded that, although each defendant, on request, furnished to other defendants the most recent price charged or quoted a particular customer on the "implied understanding" that it would thereby receive such information, on request, at some later date (App. 565), there was no specific agreement or understanding to exchange such information (App. 565). In finding no agreement, the court relied on its conclusions that (1) the decisions to give or not give and to request or not request such information were the individual decisions of each defendant (App. 566); (2) defendants "usually," although not always, furnished the price information on request, and on various occasions during the period covered by this

[9] The district court rejected as irrelevant the defendants' claim that their conduct was permitted under the terms of a 1940 consent decree (App. 583). "It does not legalize unlawful conduct." (*Ibid.*)

The consent decree was entered in a government antitrust suit against Container Corporation, Inland Container Corporation and the predecessors of seven other defendants in this case (F. 40). It prohibits the defendants and their successors from limiting production, fixing quotas, or fixing or maintaining prices for corrugated or solid fibre containers. However, the decree specifically does not prevent the defendants from "gathering, auditing, and disseminating information as to * * * the actual price (or base price derived from actual price) which the product has brought in past transactions * * *" or deny them the right "to issue and circulate lists of current prices charged for its corrugated or solid fibre containers provided such lists are made available to the trade and competitors" as long as there is no agreement or concerted action as to prices (F. 44).

complaint, some defendants stopped requesting and furnishing such information altogether (App. 566); (3) price information was requested and furnished to competitors infrequently because defendants could usually get such information from their own records or from customers (App. 565–566); and (4) no uniformity existed as to the substance and scope of the price information given (App. 566). The court concluded that the most the government had proved was a "course of conduct by the defendants, or parallel business behavior" which under *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, does not require an inference of a conspiracy (App. 566–567).

The court further held that even if there was an agreement to exchange price information, there was no "common scheme" to fix prices (App. 568). This conclusion was based on the findings that (1) there was substantial shifting of accounts among defendants (App. 569); (2) each defendant exercised its own independent judgment in determining the price to quote and the desirability of the business (App. 569); (3) many factors other than the price charged or quoted by a competitior entered into decisions regarding the desirability of the order and the price to quote (App. 569); and (4) this industry is highly competitive. The court concluded that the exchange of such information merely gave the recipient the ability to compete on a basis of fuller price information (App. 569).

The court further ruled that the arrangement did not have the effect of restricting price competition (App. 570). The court viewed as indistinguishable the

effect on prices of receiving price information from competitors or from a defendant's own records or customers, a practice admittedly legal (App. 571). The court also noted that there was no uniformity or harmony among defendants or plants as to the velocity or direction of individual price trends (App. 570), and that there was no evidence from customers indicating that prices charged were stabilized or harmonized by the exchange of price information (App. 570).

On this basis, the district court entered judgment for the defendants.

SUMMARY OF ARGUMENT

Defendants' practice of furnishing to one another, upon request, information as to the most recent price charged or quoted to specific customers on specific orders had the unlawful purpose and necessary effect of stabilizing prices and minimizing price competition. It was a combination, conspiracy or agreement in restraint of trade, in violation of Section 1 of the Sherman Act.

I

Explicit agreement is not a necessary element of a Sherman Act violation; "combination", "conspiracy" or "agreement" is inherent in defendants' course of conduct. The district court found that each defendant requested from his competitors the most recent price charged or quoted to a specific customer whenever it needed such information and could not obtain it from any other source, and that each defendant usually furnished such information accurately upon request,

with the "implied understanding" (App. 565) that it could obtain such information in turn at some later time. Each price communication was a joint action involving at least two defendants—the requester and the supplier of information. The court found that the defendants, after receiving price information from a competitor "felt compelled to give similar information upon request" (App. 567). This reciprocal, interdependent aspect of the practice is a unifying dimension which establishes an overall pattern of conduct constituting a "combination", "conspiracy" or "agreement" within the meaning of Section 1.

II

Concerted activity aimed at limiting price competition or tampering with the price structure is unlawful *per se* (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–223, 224, n. 59), even if the limitation upon price competition may be indirect. See *United States* v. *General Motors Corp.*, 384 U.S. 127, 147–148. That is the situation in this case. Full disclosure among competitors of actual prices being quoted to specific customers is necessarily anticompetitive in a market, such as the corrugated container market in the Southeastern states, characterized by relatively few sellers, identical products, competition for sales based solely on price, and inelasticity of demand. A seller in such a market without full knowledge of his competitors' price must independently decide how low he can afford to bid to return a satisfactory profit. With knowledge of the "going market" to a particular cus-

tomer, however, he no longer has an incentive to go as low as he might be willing, but may seek to maximize his profit by meeting or only marginally undercutting his competitors' price. Conversely, he has little incentive to cut a competitor's price substantially if he knows that such a cut could promptly be discovered and met, because the anticipated benefit of the lower price—increased business—becomes instead an anticipated detriment—the same share of the business at a lower return. Defendants' reciprocal exchange of information in this case facilitated prompt discovery of prices quoted to specific customers. The result, as the court found, was that a defendant, after ascertaining a competitor's price, in a majority of instances quoted the same price to the customer (F. 28).

Uncontradicted testimony demonstrated that defendants were well aware that their concerted action tended to stabilize prices, and that this was the unlawful purpose of the combination. The fact that the defendants made the same use of price information whether obtained from competitors, or from their own records or from customers, does not save their collaboration from illegality. In those instances in which the defendants lacked information from records or customers, their practice of price communication is what enabled them to moderate the vigor of price competition in this industry. In the absence of defendants' practice of reciprocally exchanging price information, a buyer would have the option, in critical competitive situations, to disclose to a supplier the lowest bid received if he anticipates

that further competition will drive the price down—or not to disclose such information in those instances in which he believes that alternative would best serve his interest. The latter alternative would seem especially attractive where, as here, the most frequent result of the defendants' knowledge of a competitor's price was a matching of that price.

The anticompetitive tendency of exchanging information as to prices charged or quoted to specific customers has twice led this Court to condemn it. *American Column & Lumber Co.* v. *United States*, 257 U.S. 377; *United States* v. *American Linseed Oil Co.*, 262 U.S. 371. And in *Sugar Institute* v. *United States*, 297 U.S. 553, in enjoining a scheme which compelled adherence to previously announced prices, the Court recognized the importance of preserving opportunities for pricing variations in transactions with specific customers.

The fact that defendants' arrangement did not eliminate all price competition is irrelevant, as is evidence that prices trended downward during the period covered by the complaint. The downward trend is readily explained by continuing excess capacity and pressures generated by new entry. The government did not contend, and was not obliged to show, that all price competition was suppressed; it was enough that defendants' concerted activity operated to limit and reduce it.

ARGUMENT

I. DEFENDANTS' PRACTICE OF FURNISHING PRICE INFORMATION TO ONE ANOTHER, UPON REQUEST, IS JOINT, RECIPROCAL, INTERDEPENDENT ACTION WHICH CONSTITUTES A COMBINATION, CONSPIRACY OR AGREEMENT WITHIN THE MEANING OF SECTION 1 OF THE SHERMAN ACT

1. "[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy * * *." *United States* v. *General Motors Corp.*, 384 U.S. 127, 142–143. While purporting to recognize this principle (App. 564–565), the district court imposed such a requirement in concluding that although the defendants furnished price information with the "implied understanding" that such action would enable each to receive such information upon future request (App. 565), no agreement among them so to act had been established. But this Court has made it clear that an "agreement" or "combination" within the meaning of the Sherman Act may be inherent in a course of conduct. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29; *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208. The course of conduct of the defendants in this case involves joint, interdependent and reciprocal action; it constitutes a "combination" or "conspiracy" whereby, on request information was exchanged from which a defendant could determine the price his competitor was charging to a specific customer. The "implied understanding" that the combination would operate in this manner constitutes an "agreement" in restraint of trade.[10]

[10] The complaint charged that "the defendants have engaged in a combination and conspiracy * * * [which] has consisted

On the basis of undisputed facts, the district court found that, at least since 1956, each defendant requested from its competitors information as to the most recent price charged or quoted a specific customer whenever it believed such information was needed and was not available from any other source (F. 30, 69, 85, 95, 107, 117, 130, 146, 162, 183, 197, 208, 222, 238, 251, 262, 275, 289). Similarly, each defendant, upon receiving a request from a competitor for such price information, usually furnished it ac-

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of a continuing agreement, understanding, and concert of action among defendants to exchange among themselves information respecting prices they have charged, contracted to charge, or quoted, specific customers, for the purpose and with the effect of restricting price competition among themselves in the sale of corrugated containers" (App. 6–7). The district court stated that the government "concedes that if it had only charged in the Complaint that the defendants had agreed to exchange price information, it would have no case, and that the Complaint would be subject to dismissal" (App. 567). From this it inferred that the government undertook the burden of showing not only an agreement to exchange price information, but also a further agreement as to the use that would be made of such information (App. 567). But the government never suggested that its case required more than a showing that *the agreement to exchange price information* had the purpose and necessary effect of restricting price competition. During the colloquy with the district judge which constituted the alleged concession, the government's trial attorney stated: "*The Government contends that this system*—this system, this understanding, this common practice of doing this *inevitably leads to a restriction of competition with respect to those customers for which the past market is requested*" (Tr. Jan. 11, 1967, p. 39, emphasis added). Indeed, the teaching of this Court is that inquiry into effect is unnecessary if there is a concerted undertaking by competitors to tamper with the price structure. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 224, n. 59.

curately (F. 31, 70, 86, 96, 107, 118, 131, 147, 168, 183, 198, 209, 223, 239, 252, 263, 276, 290). Seven defendants expressly acknowledged that their reason for giving price information was the "hope," "belief" or "expectation" that they would be furnished such information when they wanted it at some later time (F. 151(f), 190, 215, 230, 270, 282, 296). Indeed, the defendants in effect conceded that the practice of giving information was dependent upon the similar practice of other defendents, that giving was the *quid pro quo* for receiving information (Defendant's post-trial brief, p. 75):

> Thus, the answer to plaintiff's question as to why a defendant *gave* and requested price information is obvious. It is because each defendant *wanted* market information from whatever source available in order to make the necessary individual marketing decisions which would permit it to compete effectively. [Emphasis added.]

In other words, the defendants gave information because such action was necessary if they were to receive the information they wanted from their competitors.

The district court similarly recognized that each defendant's furnishing of price information was dependent upon its reasonable expectation, based on the longstanding practice within the industry, that it would receive information from its competitors (App. 565):

> Unquestionably, during all or a part of the period covered by the Complaint, each of the defendants furnished to other defendants, upon

request, the most recent price charged or quoted to specific customers for corrugated containers, and this was done with the implied understanding that by furnishing such information each defendant would, upon request, receive similar information. The evidence also permits the inference that each of the defendants knew that this practice was engaged in to some extent by other defendants. Since each defendant gave price information to other defendants with the expectation that the same kind of information would be furnished by the competitor, reciprocally, when requested, the plaintiff contends that a combination and conspiracy has been proved.

2. Relying on *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corporation,* 346 U.S. 537, the district court held, however, that despite this "implied understanding" among the defendants that they would reciprocally furnish price information to each other, the government had failed to establish the existence of combination, conspiracy or agreement because it had shown merely that the defendants had engaged in "parallel business behavior" (App. 566). This holding ignores the crucial distinction between this case and *Theatre Enterprises.* In that case, the plaintiff claimed that the refusal of motion picture producers and distributors to furnish it with "first-run" motion pictures in its suburban theatre was the result of a conspiracy among the defendants to restrict such showings to downtown theatres. In affirming a jury verdict in favor of the defendants, this Court stressed that the parallel behavior of the defendants was explainable

on the basis of the independent self-interest of each, and that the existence of an agreement was not a necessary inference from the fact that they all acted in the same way. That is, the jury had adequate basis for concluding that each film distributor independently had decided that it could maximize its own profits by limiting first-run showings to downtown theatres, without regard to whether its competing distributors followed the same practice.

Theatre Enterprises has no relevance, however, to the undisputed facts of this case, for the actions of the defendants here were in no sense "independent." In *Theatre Enterprises* the challenged conduct did not in itself involve any collaboration between two or more of the alleged co-conspirators. By contrast, the present case is *not* one of consciously parallel *individual* conduct among alleged co-conspirators. Each price communication necessarily was a joint action in which at least two competitors participated—the defendant requesting the information and the one furnishing it. Nor were these isolated incidents. The findings show that every one of the defendants engaged in such communications with either all or a majority of the other defendants with which it competed. Even in the unlikely event that only one communication occurred between each pair of defendants found to have communicated in this way, these findings reflect more than 100 instances of such communications between different pairs of defendants (see F. 73, 88, 98, 109, 120, 136, 149, 161, 185, 200, 211, 225, 241, 253, 265, 278, 292).

This aggregation of trade restraints resulting from the joint conduct of these freely circulating "dancing partners" (cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 179) added up to a pattern of exchanges of price information upon request among the various defendants. If agreement to perform these acts would be a violation of Section 1 of the Sherman Act, then the concerted performance of the acts themselves is *a fortiori* a violation. Section 1 is designed to protect against collaborations in restraint of trade, not against mere words for their own sake.[11] "[C]oncerted action to restrain trade, clearly established by the course of dealings" brings Section 1 into play. *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 195. "Combination" or "conspiracy" or "agreement" is inherent in the concerted performance. In reversing a holding by a district court similar to the present one on this point, this Court said, "conspiracy arises implicitly from the course of dealing of the parties." *Id. at* 194, 192–195. Accord, *United States* v. *General Motors Corp.*, 384 U.S. 127, 141–145; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43–45.

Moreover, as demonstrated above, each defendant's decision to furnish a price on request was interdependent upon the reciprocal decisions of the other defendants to respond in kind, also upon request. Surely the "implied understanding" that the one now furnish-

[11] "Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44.

ing information would later be able to get the same kind of information when it made the request was a significant reason why every defendant was willing to *furnish* information to a competitor, for otherwise that simply enhanced the possibility that the recipient would be able to take away some or all of the particular customer's order. This reciprocal aspect of the practice establishes the interdependence of defendants' conduct—a unifying dimension of the "combination" or "conspiracy" or "agreement" among the defendants to furnish price information upon request.

3. None of the district court's stated reasons for ruling in favor of the defendants on this issue is legally relevant.

a. First, the court stated that the "conceded freedom" of each defendant to request or furnish or not to request or furnish information is the "very antithesis of agreement" (App. 566). This freedom, however, was merely the freedom to withdraw from the combination whenever any defendant concluded that the benefit of receiving information no longer outweighed the detriment of giving it. Of course, a conspiracy does not have to command undeviating obedience from all members on all occasions to be illegal. The court itself recognized that when a defendant requested information from a competitor, "by receiving such information, [it] felt compelled to give similar information upon request" (App. 567). Thus, whenever a defendant requested and received information, it was affirming its willingness to furnish such informa-

tion. The undertaking of such an obligation, in return for benefit received, is the essence of agreement.[12]

b. Second, the court's reliance upon the alleged infrequency and irregularity of price communications among the defendants (App. 565–566) overlooks the anticompetitive significance of its own findings and the supporting evidence. The frequency of requests for price information naturally varied from defendant to defendant, from time to time, and from customer to customer (F. 32). This is readily explainable by reference to the court's own finding (F. 29) that such information was usually available from defendants' own records or from the customers themselves. The necessity to ascertain price from competitors would arise only when these regular sources were unproductive. But these situations, in which competition was moderated by the exchange of price information (see point II, below), were precisely the ones that opened the possibility of price reductions and hence were the most significant. An obvious and highly important example would be when a defendant had an opportunity to bid for an order from a customer to whom it had not sold in the recent past, and the customer chose not to inform the prospective seller as to the price it would have to meet or beat in order to obtain the business.[13]

[12] It is significant that when four of the defendants determined as a matter of policy to cease furnishing price information to competitors, each also directed its personnel not to request such information either (F. 71, 167, 186, 262).

[13] For example, the opening of a plant in a new area, with the attendant necessity of determining the "going market" to potential customers in that area, would require a relatively high

The fact that price communication may have been necessary only infrequently or irregularly [14] for some defendants hardly negates the existence of a practice among all the defendants to furnish price information *whenever requested*—a practice sufficient to eliminate informational gaps in critical competitive situations. Indeed, the uncontested testimony of seven pricing officials of defendants was that the practice was well "established", "common" and "not unusual" (App. 598, 599, 611, 655, 708, 771–772, 781). Mr. Kyle, Chairman of defendant Miller Container Corporation, perhaps best described it when he admitted that: "Well, each time we thought we had a need for it, we tried to employ the device. * * * It was a common practice for us to contact our competitors when we thought we had reason to do so" (App. 776–777).

c. Finally, lack of uniformity as to "the substance and scope of price information furnished" (App. 566) was without significance. Although the most recent price charged or quoted was furnished sometimes in terms of "board levels" and sometimes in terms of "end prices," each defendant had available manuals with which it could compute the end prices of different

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frequency of requests for price information (App. 720). Any upward or downward pressure on price, such as an increase in raw material costs, also would affect the frequency of calls (App. 799).

[14] Defendants sought information from competitors only when reliable information was not available from their own records or from customers (see F. 29). The willingness of customers to give such information may well be encouraged by awareness that a seller can obtain it anyway from his competitor.

types of containers once it knew the board levels and setup charges. The form in which price information was given was only a matter of convenience to the defendant requesting or furnishing it; in whatever form the information was given the recipient could ascertain the price charged by its competitor on a specific order to a specific customer (see F. 45, 46, 52, 55). It is hardly likely that competitors would communicate price information to each other and yet do it in a way that would not be comprehensible to the recipient of the information.

Nor is it significant that price information was given to a competitor sometimes in terms of the most recent price charged on a past order and sometimes in terms of the most recent price quoted a particular customer on a sale not yet complete. The court found that each defendant quoted prices determined on the same basis to the same customer over a period of time unless there was a change in market or competitive conditions (F. 23). It further found that no defendant could sell at a higher price than another defendant (F. 25), and that for that reason there was a vital need for accurate information as to price alternatives available—not once available but available now—to specific customers (F. 19(a)). The court made an individual finding with respect to each defendant that, among other reasons, it requested most recent price information from its competitors when it "considered it necessary to ascertain the accuracy of a customer's report of another defendant's price" (not "past price") (F. 69, 85, 95, 107, 117, 130, 146, 162, 183, 197, 208, 222, 238, 251, 262, 275, 289).

Indeed, employees of all but two defendants testified that the price they gave reflected either their most recent quotation to a particular customer (whether the sale had been completed or not) or "the going price," *i.e.*, what a specific customer was "then paying" or what a competitor was "then charging" (see *supra*, p. 5). Thus, when asked what he meant by "past market", one witness replied: "Poor English, I suppose. It is the price that boxes sold at. It is the price that someone is selling various cartons for." (App. 698.)

It is clear that in whatever form the price information was furnished, each defendant understood that the price he was given was the *current* price which the customer would have to pay in order to obtain containers from the defendant furnishing the information.[15] Upon receiving price information as to a particular customer from a competitor, each defendant usually quoted the same price (F. 28). Such action would not make sense as a pricing decision intended to obtain business unless the recipient understood that it was receiving the current price being offered to the customer by the furnishing competitor.

In short, in its failure to hold that the practice among defendants of furnishing one another price information upon request constituted a combination,

[15] The record reveals a number of specific instances in which, because the most recent price quoted a particular customer was different from a price previously charged in a completed sale, a defendant gave the most recently quoted price (App. 675, 699–700, 718–719, 740, 773–774, 791–792, 882–884).

conspiracy or agreement for Sherman Act purposes, the district court applied an erroneous legal standard to its own findings and the uncontradicted evidence. See *United States* v. *General Motors Corp.*, 384 U.S. 127, 141, n. 16.

II. THE RECIPROCAL EXCHANGE OF PRICE INFORMATION AMONG THE DEFENDANTS VIOLATED SECTION 1 OF THE SHERMAN ACT

The government argued in the court below that the concerted activity of the defendants violated Section 1 of the Sherman Act because it had the purpose and necessary effect of either maintaining identical price quotations to particular customers or of minimizing the amount of price reductions (App. 588–590). The court held, however, that "cooperative and reciprocal action between and among competitors for the purpose of stabilizing prices" is not illegal so long as the decision whether or what to bid on a particular order remains "the individual decision of each defendant" (App. 569). The court thus failed to recognize that concerted activity which is aimed at limiting price competition or interfering with the setting of price by free market forces is unlawful *per se*, see *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59, and is no less unlawful because the limitation on price competition may be indirect, *United States* v. *General Motors Corp.*, 384 U.S. 127, 147–148.

1. In a hypothetical market characterized by many sellers competing on all sales (a "perfectly competitive" market), it may well be that rapid dissemination

of current price information may not restrain price competition absent a specific agreement to fix prices; indeed, in such a market full knowledge may facilitate the setting of a truly competitive price. But the corrugated container market in the Southeastern states is quite a different market, in which the necessary effect of price communication among competing sellers is anticompetitive.[16] The market here is dominated by relatively few sellers—the eighteen defendants account for 90 percent of sales (F. 8), and competition for a given sale to a particular buyer usually involved substantially fewer (F. 22(f); App. 594, 665; CX 6, p. 458). Because the product sold, when made to specifications, is fungible, competition for sales is on the basis of price (F. 28). But since buyers place orders only to fill immediate, short-run needs (F. 14), demand is highly inelastic—that is, the buyer must purchase at the best price obtainable at the time and has no option to withdraw from the market if the price is too high; by the same token he will not increase the volume of his purchase in response to an attractively low price.

In such a market a seller without knowledge of the price being quoted by his competition must base his own price on an independent decision on how important the order is to him and how low he can bid and yet obtain a satisfactory profit on the business. With

[16] For a general discussion of the relation of market structure to the role played by dissemination of prices, see, *e.g.*, Kaysen & Turner, *Antitrust Policy* (1959), 149–150. See, also, Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955), 325–326.

knowledge of the "going market" to the customer, however, he no longer has an incentive to price as he might otherwise be willing. He may well conclude that he can maximize his profit by meeting the competitors' price, thus sharing the business (the usual decision in this market (F. 28)),[17] or pricing only marginally lower if he wishes to increase his share. The tendency toward pricing uniformity is enhanced if the seller knows that if he chooses to cut a price to a customer, his competitors can ascertain this fact and promptly meet the lower price. A seller no longer anticipates the competitive advantage which would normally result from charging a lower price—a larger share of the available business. Reducing his price instead seems likely to result only in the detriment of having to accept the same share of the customer's order at a lower return. The defendants here, recognizing an obligation to furnish price information upon request as a condition of their right to request such information (App. 567), knew that any price they quoted was subject to prompt discovery by any competitor upon request.

The result of price communication in this market is apparent from the court's finding (F. 28) that a defendant, having ascertained what its competitors are charging a particular customer, would usually quote substantially the same price. In a market such as this one, maintenance of some measure of uncertainty

[17] The incentive to meet rather than undercut a competitor's price was encouraged by the practice of buyers of purchasing from two or more suppliers concurrently (F. 24), and of dividing orders among sellers willing to meet an initial low bid (F. 28).

as to competitors' bids on specific orders is essential to ensure that individual pricing decisions will result in the setting of a truly competitive price. The defendants' reciprocal exchange of price information effectively eliminated this degree of uncertainty.

This Court has recognized the importance to free competition, in an industry with characteristics markedly similar to those of the corrugated container industry, of preventing too complete a disclosure among competitors of actual prices offered to specific customers. See *Sugar Institute* v. *United States*, 297 U.S. 553, 600:

> We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in this country. They supply from 70 to 80 per cent. of the sugar consumed. Their refineries are in the East, South, and West, and their agreements and concerted action have a direct effect upon the entire sugar trade. * * *
>
> Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration. * * * The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired.

2. The court's own findings and the uncontradicted testimony of industry witnesses show that the defendants were well aware that their practice of exchanging price information would tend to stabilize prices; and

that this was precisely its purpose, a purpose clearly illegal under *United States* v. *Socony-Vacuum Oil Co., supra.* (See F. 60, 139, 151(e), 317, 321; (App. 622, 660-661, 712, 725, 731–732, 782, 819–820, 826–827, 859, 1023, 1024, 1026–1028). Testimony affirmed that the exchange of information served to prevent "destructive" prices which would "demoralize [the] market" (App. 628, 859); one witness stated that by receiving price information he could avoid going as low as he was willing to (App. 712); others that they could thus avoid quoting lower than their competitors (App. 725, 819–820); another that the exchange of information prevented a buyer from getting a "better price than he deserves" (App. 680); still another testified that without price information from competitors it was impossible for him to raise prices without losing customers (App. 782).[18]

[18] When defendant Mead Corporation stopped giving and receiving price information, Beams, then a temporary sales manager for defendant Continental Can Company, complained in a memorandum (App. 1024, emphasis added):

> It is becoming increasingly apparent that Mead Containers in this area are not following a constructive pricing pattern and it is obvious as far as the knowledge of our accounts go that they are reluctant to raise any prices wherein they have a major position. They are not following any estimating manuals with which we are acquainted and which are used in this area. We find many instances in our accounts where they have cut prices in late September and even in October. *They are not seeking any market information.* In conclusion, they will go to any length to maintain their present volume and customers and are striving by any means necessary to improve their volume position.

See, also, the memorandum by Groner of Continental Can Co. complaining of this same situation (App. 1023).

These sundry euphemisms effectively admit that the defendants requested price information from their competitors for the purpose of chilling the vigor of price competition. The defendants have not suggested any other reason for this practice, and it hardly could be contended that the defendant corporations are so ignorant of their own costs and business circumstances that they are unable to determine for themselves what prices to charge in order to return a satisfactory profit (see F. 22).

Correlatively, the willingness of the defendants to *furnish* price information to their competitors upon request reflects an understanding that their common purpose in requesting the information was price stabilization. As one witness testified, by giving information he prevented his competitor from cutting too low (App. 634):

> We would give them the information, Mr. Bernstein. If I am selling a box for a dollar and I don't give you the information, you got to guess at my price, and I don't want you guessing 68 cents of my dollar price. If you are going to cut it I would rather you cut it a penny, to 99. Don't make me look like an idiot. That is why Dixie Container gives prices.

Of course, the fact that a cut of such magnitude by a competitor who does not receive price information is considered a realistic possibility is the strongest possible evidence that the existing market is not a

truly competitive one.[19] Nor is the fact that the purpose was not necessarily to fix a specific price level, but rather to restrict the range of competition by minimizing price cuts, relevant to the conclusion that the practice violates Section 1 of the Sherman Act. For that section prohibits any concerted tampering with the price structure that impinges upon the free play of competition in setting both price levels and individual prices. See *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 221–223; *Plymouth Dealers' Ass'n of Northern California* v. *United States,* 279 F. 2d 128 (C.A. 9).

3. The district court concluded that the exchange of information could have no illegal effect because a defendant made the same use of such information when it was obtained from a competitor as when it came from the defendant's records or from the customer (App. 571).[20] It reasoned that "if purchasers had always given accurate and reliable information, there would have been no necessity for calling upon a competitor for verification, and the price structure in the corrugated container business would have been

[19] The same witness testified, with apparent indignation (App. 628): "For the last two years, 95 percent of my competitors are what we call off the air, that is, no communication. In that two years, the prices of corrugated boxes have deteriorated in some instances 40 percent, simply for lack of communication."

[20] This, of course, ignores the teaching of this Court that the Sherman Act prohibits combinations of competitors to suppress competition even though the same economic result might have been reached in the absence of joint action. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 42.

the same as if no information had ever been exchanged with competitors" (App. 571). But this is precisely the premise of the government's case—that in the absence of information from records or customers, price communication among defendants was essential to the maintenance of a "stable" market.

In any price negotiation the legitimate interests of the seller and buyer necessarily clash. The seller seeks the highest possible price, while the buyer seeks the lowest. From this natural conflict of objectives will come the setting of a competitive price in a free market. To induce competition among sellers, the buyer will invite them to bid against one another for a given order. If the buyer anticipates vigorous competition he may conclude that it is to his advantage to advise them of the lowest bid received, contemplating that further competition will drive that price down.

In the Southeastern corrugated container market, however, sellers with knowledge of what their competitors were charging usually charged substantially the same price (F. 28). A rational buyer might well conclude that his interests would best be served by withholding from a bidder a quotation received from a competitor. By thus introducing into the bidding this element of uncertainty the buyer might expect to discourage price uniformity and stimulate price competition leading to establishment of a price based on the bidder's costs. Through their reciprocal exchange of price information in times of "necessity," defendants had the means to frustrate this legitimate pur-

pose by prompt communication of market alternatives to ensure a stabilization of price.

4. The conclusion that communication among competitors as to actual prices charged or bid to specific customers is a forbidden means of reducing incentives for price reductions is hardly novel doctrine. This Court recognized the unlawful tendency toward restraint on price competition of such practices in two leading cases more than forty-five years ago. *United States* v. *American Linseed Oil Co.*, 262 U.S. 371; *American Column & Lumber Co.* v. *United States*, 257 U.S. 377.

In *American Column & Lumber*, the defendants, through their trade association, exchanged weekly reports based on their daily reports of the exact terms of each sale actually made, including the names of the buyer and seller.[21] The accuracy of these reports was ensured by an association audit. The association also sent out analyses of reports as to future market conditions, along with suggestions as to future prices and production. On these facts the Court found, despite the absence of an agreement as to the exact prices to be charged, that there was a concerted, systematic effort to increase prices which was illegal under Section 1 of the Sherman Act.

Although only information as to past transactions was reported in *American Column*, the Court found

[21] The defendants there also exchanged compilations of monthly production reports, monthly stock reports, and price lists. This Court has upheld the exchange of such information (*Maple Flooring Mfgrs. Assn.* v. *United States*, 268 U.S. 563), and it is not challenged here.

that sufficient information was given so that an expert analyst could readily evolve an attractive basis of "harmonious," if unexpressed, cooperation for future prices (257 U.S. at 411). In the present case, no expert analyst is necessary; everyone in the industry can evolve a basis for "harmony" from the disclosure of current prices to a particular customer at a particular time. The Court recognized, in *American Column,* that reports as to specific sales to particular customers make discovery of price reductions inevitable and immediate (257 U.S. at 411). In a market characterized by relatively few sellers and inelastic demand, price reductions are thus discouraged not only by "business honor" (*ibid.*)[22] but also by each competitor's incentive to obtain a share of the existing business at the highest possible price.

American Linseed involved the legality of an agreement among members of a trade association to report the names of the buyer and seller in each transaction and the exact price and terms of offers accepted or rejected. Like the defendants here, each member of the association could receive information, on request, as to the terms of the last sale or offer to a buyer and

[22] This concept of "business honor" apparently was not lacking among the defendants here. Witnesses testified that it was not their policy to cut a price after requesting it from a competitor (CX 4, p. 101; CX 6, p. 477). There was also evidence that a defendant which cut a price furnished by a competitor (App. 608, 635). There was also evidence that a defendant which cut a price furnished by a competitor could expect recriminations from the furnisher (App. 615–616, 721–722). On one occasion, representatives of defendant firms based in Baltimore and Richmond arranged a special meeting in Washington, D.C., to "explain" why one had undercut the other's price after requesting price information (App. 662–664).

could also verify a customer's claim of a price reduction by a competitor. Defendants there, like defendants here, claimed that the purpose of the exchange of information was to enable them to compete intelligently, but the Court recognized that the necessary effect of the arrangement was suppression of competition.

The fact that the agreement in *American Linseed* obligated the members of the association to attend monthly meetings to discuss pricing and required them to adhere to list prices filed with the association does not vitiate its force as a precedent here. The lack of these specific requirements here does not disprove that the defendants were utilizing their practice of concerted reciprocal exchange of information in order to moderate price competition.[23] As we have pointed out above, intelligent competitors in this type of market will, and defendants here did, recognize that their interest in maximizing profits will usually be best served by adhering closely to prices being charged by their competitors.

[23] Although attendance was voluntary, defendants' trade association held monthly meetings at which statistics as to price trends and production and inventory of raw materials were reviewed, and current business conditions (including current and anticipated demand as indicated by incoming orders) were discussed (F. 64). These activities were not challenged by the government. In addition, several defendants had, at various times, published price lists which were available to other manufacturers and customers (see F. 46–49). However, as is usually the case in an industry in which the product is sold to specification, price lists did not afford a reliable basis for predicting actual prices to particular customers (F. 59, 60). Defendants' reciprocal exchange of information as to specific prices to named customers affords a far more effective and reliable means of rapid price communication.

Subsequent to *American Column* and *American Linseed*, this Court decided *Maple Flooring Mfgrs. Assn. v. United States*, 268 U.S. 563, which the district court erroneously regarded as dispositive of the present case. In *Maple Flooring*, the defendants reported to a trade association individual statistics from which the association computed and distributed industry statistics as to the average cost to members of all types and grades of flooring, freight rates to points in the United States from a point approximately equidistant from all defendants' mills, and a summary of the quantity and kind of flooring sold and still on hand. Prices received for *past* sales were reported *without identifying the parties to specific transactions.* While recognizing that such information could be used as a basis for price-fixing, the court concluded that its distribution did not necessarily have that effect and therefore was not illegal without actual evidence of such improper use.

The district court, in treating *Maple Flooring* as controlling here, not only overlooked the significant evidence of anticompetitive purpose in this case, discussed *supra*, but also failed to recognize the difference in the *type* of information exchanged.[24] That

[24] The district court's comment that the exchange of information by the defendants here was less frequent and less detailed than that in *Maple Flooring* (App. 580) apparently overlooks the fact, reflected by the findings (F. 62, 63, 64), that the defendants' trade association did compile and disseminate detailed statistics of the type sanctioned in the earlier case. The reciprocal price exchanges which the government challenged went significantly beyond such legitimate trade association practices.

difference was the basis upon which this Court in *Maple Flooring* distinguished its earlier cases (268 U.S. at 584). The information disseminated by the association in *Maple Flooring* related only to past sales and did not identify buyer or seller, and thus did not afford a basis for determining current prices to any particular customer. In the present case, however, the price information furnished was in such form that current price was readily determinable (see *supra* pp. 24–26), and the court below should have recognized the necessary anticompetitive effect of the defendants' practice in the market context.

The district court also believed (App. 580–583) that the purpose of the defendants' exchange here of accurate information as to price alternatives available to a specific customer was sanctioned by *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, the only case in which this Court has upheld an agreement among competitors to exchange information as to specific sales. That decision rested, however, upon special facts characteristic of the cement industry at that time but not present in this case involving the container industry.

Because of the peculiar way cement was sold to contractors—suppliers gave contractors irrevocable offers to furnish all cement required for a specific job at a specific price which a contractor was not required to accept or reject until he won the bid for that job—during periods of rising prices contractors were tempted to, and often did, accept offers of several suppliers, thus trying to force delivery of more cement

than was needed for a specific job. Cement manufacturers who did not know about specific offers to specific customers during these periods could thus be fraudulently induced to deliver more cement, at below market prices, than was actually required under their contracts. The Court held that in those circumstances, the collection and dissemination of such information was not illegal because it was the only practical means to provide cement manufacturers with information necessary to protect their *legal* rights (268 U.S. at 603–604).[25]

In the present case, the court found that customers sometimes gave the defendants inaccurate, incomplete, or misleading information as to prices that had been offered to them by competitors (F. 30). But unlike the defendants in *Cement Manufacturers,* the defendants here have no legal right to such information from customers unwilling to give it, nor do they have a legal right to base all pricing decisions on full knowledge of competitors' prices. Contrary to the view of the court below, this case on its facts is governed by the earlier price information cases and is distinguishable from the later ones.

Any possible doubt as to this conclusion is dispelled by the fact that, subsequent to *Maple Flooring* and *Cement Manufacturers,* this Court reaffirmed its con-

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[25] *Cement Manufacturers* is unique in its allowance of the alleged need for protection against "unethical" competitors or customers as a defense to an otherwise *per se* violation of the Sherman Act. More recent cases have flatly rejected such a defense. See *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457; *United States* v. *Socony-Vacuum Oil Co., supra; Sugar Institute* v. *United States*, 297 U.S. 553.

cern that concerted action to disseminate among competitors actual prices charged to specific customers in a market such as the present one necessarily tends to restrain price competition. *Sugar Institute* v. *United States*, 297 U.S. 553. Defendants there had agreed that each would adhere to its publicly-announced prices and terms of sale in all transactions until it gave advance public announcement of any intended changes. Although it was argued that this arrangement facilitated "fair" competition by preventing "unethical" secret discounts, the Court ruled that it was an unlawful "concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be" (297 U.S. at 601). To preserve such opportunities the Court did not prohibit open announcement of price changes to the trade (in effect nothing more than price lists), but enjoined the additional restrictions designed to secure adherence to announced prices.

The defendants here recognized as clearly as did the sugar refiners that published price lists or published manuals for computing prices, because they do not reflect the often quite different prices actually charged to specific customers, are not an effective means of eliminating the opportunity for price competition based on discounts from lists (App. 811–812, 893–894, 903–904, 1041–1043; CX6, pp. 608–609). By furnishing to one another upon request accurate information as to prices charged or quoted to specific customers on particular orders, the defendants, like those in *Sugar Institute*, were enabled to employ the

self-interest of each competitor to minimize price competition among them. That they could achieve this plainly unlawful purpose and effect without cumbersome machinery to ensure adherence to announced prices makes their concerted activity no less unlawful.

5. Finally, the district court's emphasis on the fact that the arrangement did not eliminate all price competition in the industry is irrelevant. See *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30, 44. Nor does the fact that prices trended downward during the period covered by the complaint (F. 15, App. 570) have any bearing on the question whether prices were maintained at a competitive level or would have been lower in the absence of defendants' reciprocal practice. Cf. *Standard Oil Co.* (*"Standard Stations"*) v. *United States,* 337 U.S. 293, 309. Given an industry with constant excess capacity (F. 12) and substantial increase in plants and entry of new competitors (F. 9), prices would be expected to move downward in response to these pressures.[26] In any event, the government did not contend that the arrangement had the purpose or effect of suppressing all price competition in the industry, but only that it operated to limit and reduce the vigor of such competition—an effect that is no less unlawful under Section 1 of the Sherman Act. See *United States* v.

[26] Indeed this impressive amount of expansion and new entry is highly suggestive that prices were maintained above a truly competitive level. Businessmen may not ordinarily be expected to invest heavily in an industry characterized by unused capacity and inelastic demand unless the anticipated return is unusually attractive.

General Motors Corp., 384 U.S. 127, 147–148; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–223, 224, n. 59.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the case remanded for the entry of an appropriate judgment.

Respectfully submitted.

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